Supreme Court, U.S.
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No. 97-928

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PAUL A. BILZERIAN,
Petitioner,

v.

HSSM #7 LIMITED PARTNERSHIP,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF

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January 16, 1998

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INTRODUCTION

In my Petition for a Writ of Certiorari, I raised three issues with respect to § 523(a)(2)(A) of the bankruptcy code: whether punitive damages are dischargeable; whether a creditor is required to prove that he sustained an actual loss; and whether a creditor is required to prove that the debtor **actually obtained** money or property from the creditor.

1. The Court has Already Granted Certiorari to Resolve the Punitive Damages Issue.

With respect to the first issue, Respondent acknowledges that this Court has granted certiorari in Cohen v. Hilda De La Cruz, No. 96-1923, to resolve that very issue. Respondent also acknowledges that, at the least, the Court should hold my Petition pending its ruling in Cohen. The only argument Respondent offers to deny my Petition is that the punitive damages issue "was a minor point below." (Respondent's Brief in Opposition, page 8).

First, the amount of punitive damages in this case is over $1 million, or more than ten times the amount at issue in the Cohen case. Second, the issue was not heavily contested because the Eleventh Circuit ruled during the early stages of this case that punitive damages were not dischargeable under § 523(a)(2)(A). In re St. Laurent, 991 F.2d 672 (11th Cir.1993). The only forum other than this Court where I even could have raised the issue was the Eleventh Circuit, sitting en banc.[1]

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[1]I did raise the issue in a Suggestion for Rehearing En Banc but it was denied.

2. The Court Should Determine Whether a Creditor Must Prove Loss.

With respect to the second issue, Respondent presents a collection of distorted and irrelevant facts (almost none of which Respondent presented to the bankruptcy court) in a mighty effort to lead the Court away from the actual issue. This case was initially decided in my favor on summary judgment by the bankruptcy court. On appeal, the district court reversed and, based solely on the collateral estoppel effect of a prior civil judgment, granted summary judgment in favor of Respondent. Clearly, there should be no factual disputes, although Respondent desperately seeks to create a false impression to the contrary.

In this case, the Eleventh Circuit excepted from discharge a judgment in equity for recission of a contract **(not for actual damages)** based on fraud in the inducement. Notwithstanding Respondent's disingenuous effort to imply otherwise, **it is undisputed that Respondent suffered no loss.** Respondent did not allege a loss in his state court complaint, or during the state court trial, or before the Court of Appeals for the Fifth Circuit. In fact, HSSM did not even allege a loss in its complaint filed in the bankruptcy court and has never presented the slightest shred of evidence of loss to any court.

In the Texas case, HSSM argued to the Texas jury that its Suncoast investment was worth **$40 million. The trial court's findings of fact and the jury's verdict** both stated that HSSM's investment in Suncoast was worth **"$34,272,000"**, or **$14 million more than HSSM invested.**[2] On appeal to the Fifth Circuit, HSSM argued that loss was **not** a requirement for an action in equity for recission.

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[2]Incredibly, Respondent seeks to mislead this Court in its reference to an irrelevant "Question No. 5" that was answered by the jury in the prior proceeding. Respondent states that my Statement of Facts "ignores the fact that this finding was not adopted." (Respondent's Brief in Opposition at page 7). I did not mention "Question No. 5" because it has nothing whatsoever to do with my point that HSSM never proved (or even alleged) that it had sustained a loss. It is undisputed that the trial judge and the jury **both** found that HSSM's investment was worth "$34,272,000", or $14,000,000 more than HSSM had invested. (HSSM had argued that the jury should find its investment was worth $40,000,000, or $20,000,000 more than it had invested.)

The Respondent's Judgment requires me to repurchase HSSM's investment in Suncoast for HSSM's cost (approximately $20 million) and, in return, for HSSM to transfer ownership of its interest in Suncoast to me. Respondent's Brief in Opposition says nothing about the fundamental problems associated with excepting such a judgment from discharge. Should such a judgment be considered an executory contract? Should the chapter 7 trustee consider the contract an asset of the estate? Should the creditor be liable to the debtor or the bankruptcy trustee for any actions it takes to diminish the value of the asset or for failing to take action to maximize the value of the asset to be repurchased?

In Field v. Mans, 116 S.Ct. 437 (1995), this Court established the standard of reliance for § 523(a)(2)(A). In so doing the Court plainly stated that § 523(a)(2)(A) "refer[s] to common-law torts." Ibid, 116 S.Ct. at 443. In every single jurisdiction in the United States, an action for common law fraud requires the plaintiff to prove an actual loss. Therefore, it clearly follows that loss should be an essential element of § 523(a)(2)(A). The Eleventh Circuit's ruling in this case reached a contrary result.[3] This Court should grant my Petition and determine whether loss is an essential element of § 523(a)(2)(A).[4]

3. The Court Should Determine Whether a Debtor Must Obtain Money or Property from the Creditor.

With respect to the third issue, whether a creditor is required to prove that the debtor **actually obtained** money or property from the creditor,

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[3]Respondent accurately quotes the Eleventh Circuit statement that my argument regarding loss was "meritless in light of the money judgment entered in favor of HSSM in the Texas case." (Respondent's Brief in Opposition, page 9). However, that is precisely the issue that requires resolution by this Court. Whether a money judgment for recission of a contract is sufficient to prevail under § 523(a)(2)(A), or, in other words, is the creditor required to prove an actual loss?

[4]It is unlikely that there will be many cases presented to the Court like this one, where the issue of loss is undisputed. In most cases, the issue of loss and the extent of the loss is hotly contested.

Respondent addresses the handful of Circuit Courts that agree with the general approach taken by the Eleventh Circuit in this case and proclaims that there is "no split on this issue" and, therefore, "no reason exists for granting the petition." (Respondent's Brief in Opposition, page 9). However, Respondent ignores altogether the dicta in Grogan v. Garner, 498 U.S. 279, 282 n.2, 111 S.Ct. 654, 657 n.2 (1991), where this Court stated that "arguably, fraud judgments in cases in which the defendant **did not obtain money, property, or services** from the plaintiffs **and** those judgments that include punitive damages awards are more appropriately governed by § 523(a)(6)." (emphasis added). Respondent also fails to mention that the Eleventh Circuit itself acknowledged that the "bankruptcy courts diverge on this question." In re Bilzerian, 100 F.3d 886, 890 (11th Cir.1996).[5]

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[5]"Obtaining money" is capable of but one meaning, that is the direct transfer of money from a creditor to a debtor. In re Grubbs, 9 B.R. 499, 501 (M.D.Ga.1981); In re Owen, 181 B.R. 288, 291 (Bank.W.D.Va.1995) ("the plain language of the Code does not equate 'cause' with 'obtain'."); In re Fritz, 88 B.R. 434, 435 (Bank. S.D.Fla.1988)(debtor must actually obtain money, plaintiff's interpretation accords no meaning or purpose to the word "obtained" and treats it as though Congress had substituted the word "caused"); Chaffin v. Dunn, 56 B.R. 736, 742 (N.D.Ill.1985) (plaintiff must prove a fraudulent transfer of money or property from the plaintiff to the debtor); In re Cohen, 69 B.R. 9, 11 (Bank. E.D.N.Y.1986)(debtor himself must "obtain" money by fraud); In re Gilpin, 99 B.R. 93, 95 (Bank.M.D.Fla.1989)(debtor must obtain or use funds individually for his own benefit); In re Sawyer, 112 B.R. 386, 389 (D.Colo.1990)(debtor must obtain money directly, title to stock did not pass to debtor); In re Ward, 115 B.R. 532, 538 (W.D.Mich.1990)(although debtor obtained 100,000 shares of stock and money under employment agreement, shares were valueless and debtor actually performed work, therefore, judgment for securities fraud was dischargeable); In re Bozzano, 173 B.R. 990, 998 (Bank.M.D.N.C.1994)(§ 523(a)(2) is designed to **recover what was actually lost by creditor, not what creditor expected to receive** under contract); In re Diaz, 120 B.R. 967, 981 (Bank.N.D.Ind.1989) (amount of debt nondischargeable limited to only that amount that debtor actually obtained from creditor); In re Verhelst, 170 B.R. 657, 660 (Bank.W.D.Ark.1993)(creditor must prove that debtor actually obtained money, property or services from creditor); In re Volpert, 175 B.R. 247, 262 (Bank. N.D.Ill.1994)(creditor failed to prove that debtor personally obtained and used funds obtained by debtor's corporation); In re Futch, 176 B.R. 960, 962 (Bank. M.D.Fla.1994)(no evidence that debtor obtained anything from creditor); In re Chevez, 140 B.R. 413, 420 (Bank.W.D.Tex.1992) (because the debtor received no money directly from the representations made, the debt cannot be declared nondischargeable); In re Burgess, 955 F.2d 134, 140 (lst Cir.1992) (Bank failed to allege what "property" the debtor obtained as a result of the alleged misrepresentations.); In re Rifkin, 142 B.R. 61 (Bank.E.D.N.Y. 1992)(the debtor himself must "obtain" the services by fraud.); In re Jacobs, 54 B.R. 791 (Bank.E.D.N.Y.1985) (plaintiff must prove debtor himself obtained property by fraud).

In this case, it was undisputed that I never obtained any money or property from the creditor but, instead, obtained only the potential to receive a contingent, indirect benefit as a result of the creditor entering into the contract.[6] Nearly all of the Courts to address the issue of whether an indirect benefit is sufficient to satisfy § 523(a)(2)(A) have at least required an actual benefit to the debtor rather than a potential benefit.[7] However, in the Eleventh Circuit's view, the existence of a potential indirect benefit is sufficient to satisfy the statutory language of § 523(a)(2)(A), which exempts

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[6]Respondent's attempt to mislead the Court by referring to the Singer "bonus" should not, hopefully, succeed. (See Respondent's Brief in Opposition, page 14). Respondent never even mentioned this "fact" to the bankruptcy court. Besides, Respondent invested in a limited partnership, which invested in another limited partnership, which invested in yet another limited partnership, which purchased the Singer Company, which hired me (with the consent of Respondent) and from which I received a $1.2 million bonus for completing more than eight transactions, worth more than $2 billion. It is inconceivable that Respondent should now intimate to this Court that the Singer bonus was money "obtained" as a result of fraud upon the Respondent.

[7]At least one of the cases cited by Respondent represents an instance where the debtor, or his alter ego, actually received money or property that was used for the debtor's direct and actual benefit. For example, in Matter of Luce, 960 F.2d 1277, 1283 (5th Cir.1992), the money obtained from the creditors went into the debtors' joint bank accounts and was used to acquire real estate, stock and oil and gas investments owned by the debtors, to pay business and personal expenses of the debtors, and to make payments on leases and loans guaranteed by the debtors. In this case, the evidence presented to the Bankruptcy Court supported the Bankruptcy Court's factual finding that "there is nothing in this record, or the record of the Texas litigation, to establish the fact that Bilzerian individually obtained any money or property from HSSM." HSSM presented NO evidence to the Bankruptcy Court to the contrary.

from discharge "debts for money ... to the extent obtained by ... actual fraud."[8]

[8]Some courts have found that other entities were the "alter ego" of the debtor and, therefore, held that "obtaining money" for the alter ego constitutes "obtaining money" for the debtor. In re Vermont, 98 B.R. 581 (Bank.M.D.Fla.1989)(Paskay)(debtor, as corporate principal, guaranteed loan for his corporation and submitted false financial statement to lender, deemed to have "obtained money" for purposes of 523(a)(2) when bank loaned money to his corporation); In re Colodner, 147 B.R. 90, 95 (Bank.S.D.N.Y. 1992)(money obtained for wholly owned corporation could qualify as money "obtained" by the debtor); In re Langworthy, 121 B.R. 903, 907 (Bank.M.D.Fla. 1990)(if officer, director, or shareholder has obtained money for the corporation through fraud, he will not be shielded by the corporate form); In re Benson, 36 B.R. 537 (Bank. M.D.Fla.1983); In re Holwerda, 29 B.R. 486 (Bank.M.D.Fla.1983); In re Gitelman, 74 B.R. 492 (Bank.S.D.Fla.1987); In re Delano, 50 B.R. 613 (Bank.D. Mass.1985); In re Mann, 40 B.R. 496 (Bank.D.Mass. 1984); In re Long, 44 B.R. 300 (Bank.D.Minn.1983); In re Winfree, 34 B.R. 879 (Bank. M.D. Tenn. 1983).

CONCLUSION

This Court has already decided to address one aspect of the statutory limit of nondischargeability under § 523(a)(2)(A). I respectfully suggest that it is important to debtors, creditors and bankruptcy courts throughout the United States, to decide the two related issues involving the statutory limit of nondischargeability under § 523(a)(2)(A) that I have raised in my Petition.

Respectfully submitted,

s/_____

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Dated: January 16, 1998